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NO. 90-874

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SCHERING-PLOUGH CORPORATION, PLOUGH, INC., and PLOUGH SALES CORPORATION,

Petitioners,

vs.

RAY F. ALBANO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Ninth Circuit Court of Appeals correct in finding that equitable considerations may excuse a claimant's noncompliance with the EEOC charge scope requirements, when the EEOC improperly refuses to amend the claimant's timely EEOC charge?

2. May the EEOC deprive a claimant of the extended limitations period under the Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 note (1988) by failing to notify him of the application of the Act to his case?

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RESPONDENT'S STATEMENT OF CONCURRENCE

For purposes of this Response, respondent adopts the statements in the Petition for Certiorari under the headings, "Opinions Below," "Statutory Provisions Involved" and "Statement of the Case."

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Remedial Goals of the Age Discrimination in Employment Act Require a Court to Excuse a Claimant's Failure to Comply With the EEOC Charge Scope Requirements, When the EEOC Improperly Refuses to Amend the Claimant's Timely EEOC Charge.

A. The Ninth Circuit Decision Does Not Present Novel Issues.

The Age Discrimination In Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA") is a remedial Act, enacted by Congress to protect employees from unlawful age discrimination. To invoke the Act, a claimant must file a timely administrative charge with the Equal Employment Opportunity Commission ("EEOC") and permit the EEOC to process that charge. Failing a satisfactory resolution, the claimant may initiate a federal district court suit. When, without fault of the claimant, the administrative preconditions for litigation have not been

satisfied, the courts have applied equitable principles to permit court access and thereby carry out the remedial purposes of the Act.

In 1988, Congress provided statutory protection to claimants whose rights under the ADEA were jeopardized by acts or omissions of the EEOC. The Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 note (1988) ("the Claims Act")[1], provided an extended limitations period to claimants whose age discrimination claims had not been properly processed by the EEOC. In so doing, Congress was fully cognizant of the fact that an extended limitations period might make it more difficult for employers to defend age discrimination claims. Nonetheless, Congress concluded that the remedial purposes of the ADEA were not to be thwarted by EEOC

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[1]The Age Discrimination Claims Assistance Act of 1988 has since been amended by H.R. 5794, the Age Discrimination Claims Assistance Act of 1990 to further extend the limitation period to 450 days from November 3, 1990.

error and that employers must bear any prejudice caused by the extension of the ADEA limitation periods.

Consistent with these statutory purposes, the Court below holds only that EEOC error cannot prevent an age discrimination claimant's court action. The Court does not deny an employer the opportunity to defend the action. Petitioner's claims of intolerable, if not unconstitutional employer prejudice, resulting from "the present unavailability of witnesses, changed personnel, the loss of relevant records, as well as the increased potential for back pay" are whimsical. (Pet. App., A-8). For the Ninth Circuit to adopt petitioner's arguments, it would have had to ignore the remedial purposes of the ADEA and the equitable tolling principles found in this Court's decisions.

B. The Ninth Circuit's Decision Does Not Conflict With This Court's Decision In Baldwin County Welcome Center v. Brown.

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam), this Court considered the issue of when is an action commenced under Rule 3 of

the Federal Rules of Civil Procedure. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1), requires an action to be brought within 90 days of the receipt of a right-to-sue letter. Only the right-to-sue letter itself was filed within the 90 day period, and this was held not to have commenced the action as the letter was not the equivalent of a complaint.

While the Court found no factual basis to justify an equitable tolling of the statute, it provided a review of the circumstances under which such tolling would be available.

> This is not a case in which a claimant has received inadequate notice (citation omitted); or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon (citation omitted); or where the court has led the plaintiff to believe that she had done everything required of her, (citation omitted). Nor is this a case where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. (citations omitted). The simple fact is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently

> cannot invoke equitable principles to excuse that lack of diligence.

Baldwin, 466 U.S. at 152.

The Ninth Circuit found the facts necessary to support the application of these equitable principles to the present case, noting that, "Albano had no less than fourteen conversations with the EEOC. On at least three occasions, the EEOC assured Albano that his charge encompassed his claim for constructive discharge and refused his efforts to amend." (Pet. App., A-7,8; Res. App. A-5). Under these circumstances, the Ninth Circuit held that respondent had done all that he could have been reasonably expected to do and that the EEOC, and not respondent, must accept the blame for his failure to exhaust administrative remedies. (Pet. App., A-8).

Petitioner does not dispute these findings, but asserts respondent must still be denied court access because, like respondent, it also is prejudiced. Petitioner asserts that *Baldwin* should deny the application of the

principles of equitable tolling to respondent's claim, while at the same time petitioner invokes this very same sympathy for its own position. (Pet. App., 6,7). Petitioner misperceives the remedial purposes of the ADEA. In the ADEA, Congress provided a right of litigation to age discrimination claimants and not to their employers. The Court below correctly found that to deprive an innocent claimant of his statutory rights because of the inequitable conduct of a third party, would be inconsistent with "the ADEA's remedial goals." (Pet. App., A-8). *Baldwin* is not to the contrary.

C. There is No Conflict in the Circuits.

Petitioner argues that the decision below is in conflict with the First Circuit's decision of *Kale v. Combined Insurance Co. of America*, 861 F.2d 746 (1st Cir. 1988) and the Sixth Circuit decisions of *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989) and *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). However, all are factually inapposite. None considered the

applicability of equitable principles when the EEOC, and not the claimant, is the party solely responsible for the claimant's failure to exhaust administrative remedies.

In *Kale*, the First Circuit refused to excuse the timeliness requirement for filing with the EEOC, finding that the claimant had actual notice of the filing requirement and was not entitled to equitable tolling. While the Court spoke of "absence of prejudice" as a factor, it did so only as *Baldwin* had done, that is, a claimant could not use the absence of prejudice as "an independent basis for invoking the doctrine. . . ." *Kale*, 861 F.2d at 753. Respondent makes no such claim here.

Puckett is factually similar to *Baldwin*. Its holding is based upon the absence of any facts to support equitable tolling. In *Puckett*, plaintiff could have, but failed to request a right-to-sue letter before filing her lawsuit. The Court found this conduct to amount "to a position of arrogance" and not the "compelling circumstances" described in *Baldwin*, which could justify the application of

equitable tolling or waiver. *Puckett*, 889 F.2d at 1488. Petitioner has not alleged inequitable conduct of respondent.

Andrews, another case premised upon timeliness, expressly limited its inquiry to an examination of plaintiffs "diligence in pursing their rights and the reasonableness of their ignorance of the effect of (an earlier court order)." *Id.*, 851 F.2d at 151. Finding plaintiffs to be diligent, the Court applied equitable tolling and excused an otherwise untimely appeal. Again, petitioner has not alleged inequitable conduct of respondent.

The decision below does not conflict with the decisions of the First and Sixth Circuits. Unlike the Ninth Circuit, these Courts had as an issue, the conduct of the claimants and whether that conduct justified the application of equitable principles. Petitioner elected not to contest whether respondent was without fault. Having conceded this issue, it is immaterial whether petitioner was also without fault. Assuming arguendo, the innocence

of both parties, the Ninth Circuit had no choice but to decide in favor of respondent as the claimant. The remedial purposes of the ADEA could not be fulfilled by denying claimant access to the courts. The decisions of the First and Sixth Circuits are not inconsistent with this result.

II. The Age Discrimination Claims Assistance Act Applies Whether or Not the EEOC Notifies a Claimant of His Expanded Rights Under That Act.

Petitioner correctly points out that the Claims Act extends the ADEA limitation periods for certain claimants and that its Section 4 requires the EEOC to notify these claimants of the Act. The EEOC did not notify respondent prompting petitioner to argue that the EEOC omission requires dismissal of respondent's complaint.

In effect, petitioner argues that the EEOC should be able to determine whether or not a claimant is entitled to the benefits of the Claims Act. More specifically, petitioner asserts that while the Claims Act was to correct

EEOC omissions, and that the EEOC was required to notify affected claimants in the event the EEOC failed in this obligation, it is the claimant who must suffer the loss of his statutory rights. Petitioner offers no support for this argument and ignores the uncontested facts:

> 12. Until my case was finally closed by EEOC, I recall having at least 14 different contacts with EEOC. Of those contacts, only two were in the EEOC office. The first was with the intake worker when I signed the complaint. The last was with an EEOC employee who said that the EEOC did not intend to do anything with my case and that it was too late to file a suit. I never had a face to face meeting with the EEOC investigator and would not recognize her. Although I wanted to meet with her, she was never interested in having me go into the EEOC office. (emphasis added).

(Res. App., A-5).

The record supports only the conclusion that the EEOC did not process respondent's claim as required by law and delayed its action on respondent's claim beyond the statutory period. Clearly, this is precisely the kind of agency error the Claims Act was intended to remedy.

Petitioner would amend the Claims Act to allow the EEOC to undo its error by failing or refusing to notify claimants of the Acts provisions. The Ninth Circuit properly found that EEOC noncompliance with the Claims Act cannot cause a forfeiture of claimant's rights.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

The Hon. John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAY F. ALBANO, Plaintiff, v. SCHERING-PLOUGH CORPORATION; PLOUGH, INC. and PLOUGH SALES CORPORATION, Defendants.	NO. C89-90 PLAINTIFF'S DECLARATION IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

1. I am Ray Albano, the plaintiff in this action and submit this declaration in opposition to defendant's Motion for Summary Judgment.

2. I was born March 3, 1931. For most of my adult working life I have been employed in sales. I have done well in all the jobs I have held and with the exception of my employment with defendants, I have never been in an employment relationship where I ever claimed that I had been discriminated against or where I have ever filed charges of employment discrimination.

3. I began my employment with defendants in 1973 as a sales representative. In 1983, I became aware of a plan adopted by defendant to force the retirement of its sales staff who were over the age of 50. I learned of this plan through attendance at sales meetings and discussions with various employees. In 1985, I applied for a promotion and was denied it. I was the most qualified candidate and the individu-

al selected was less than 30 years old. I asked to be considered for another position in early 1985, and was informed that I would not be considered. When I inquired as to why I did not get the position, one reason given me by one of defendant's Area Vice Presidents was that, "It was a young man's job."

4. In the fall of 1984, I learned that I had degenerative arthritis in my hip would have to have the hip replaced. I was in the hospital for about 14 days and on medical leave from October 1984, until I received a medical release in January 1985. While on leave I was expected to continue with as much of my sales responsibilities as possible. I even received a performance evaluation while on medical leave, which claimed that I was not meeting my sales goals.

5. The day after I was released to return to work, my supervisor met with me and said that I was being placed on probation for poor performance. He also removed several of my key accounts and reduced my commissions. Finally, he said that I would now have to call on retail stores and would have to help build displays for these stores. This meant carrying heavy cases into the stores as well as a lot of lifting and bending in the display construction. Because of my physical and medical limitations from the surgery, this kind of physical activity was very painful and difficult for me. However, I was told that I had no choice, and would have to do as directed, if I wanted to continue working for defendants.

6. When all of this happened, I simply was unable to handle it. I could not

afford to lose my job. I was still in pain from my surgery. I believed that these work conditions were being imposed on me to force me to quit. I became scared and upset to the point where I could go home at night and cry. I tried to force myself to do the best I could, but day after day, my supervisor would continue to find fault with my work performance, and finally, I decided I had no choice but file a discrimination charge against the defendants.

7. I went to the Equal Employment Opportunity Commission in February 1985 and spoke to an intake worker. In our conversation I covered all these areas with her: I told her about the promotions I had been denied and why I believed it was because of my age. I told her about my knowledge of the company's efforts to get rid of its

workers over age 50. I told her about my surgery and the pressures placed on me during my medical leave. I told her about being placed on probation and my commission being reduced the day after I returned to work. I told her that I had been given a job assignment that I found almost impossible to do. I told her that I believed that my employer was harassing me to make me quit my job.

8. However, the EEOC intake worker cut me short and said that she would only put the denied promotion claim in the EEOC charge. She said that I would be assigned an investigator and that I should raise the harassment issue with that investigator. I tried to discuss it further and she refused and said I should sign the complaint as it was drafted. I did.

9. In late February 1985, a woman from EEOC called me and identified herself as having been assigned my case for investigation. As conditions at work had gotten worse, I attempted to discuss the harassment issue with her. However, she said the EEOC charge as drafted was sufficient and would automatically include my concerns about harassment.

10. When I could no longer emotionally or physically handle my job, I terminated on March 1, 1985. A week or two later I called the EEOC investigator and informed her that the work conditions had gotten so bad that I had to terminate my employment. I then asked her if the EEOC charge should not be amended to reflect my termination. She told me that was not necessary.

11. I had other telephone conversations with the investigator, but I remember a

specific conversation I had with her on the termination issue in either April or May 1985. I had attended a Queen Anne high school reunion and met a classmate who was also a lawyer. I told him what had happened and he told me to contact EEOC again because he believed that my EEOC charge should be amended to allege wrongful termination because of harassment.

12. I followed his advice and called the EEOC investigator and specifically asked her to amend the EEOC charge to claim wrongful termination. And once again she refused, saying that all my rights were adequately protected in the charge as the termination issue would be included in the general age discrimination claims I had made. I felt there was nothing more I could do, so I let the issue drop.

12. Until my case was finally closed by EEOC, I recall having at least 14 different contacts with EEOC. Of those contacts, only two were in the EEOC office. The first was with the intake worker when I signed the complaint. The last was with an EEOC employee who said that the EEOC did not intend to do anything with my case and that it was too late to file a suit. I never had a face to face meeting with the EEOC investigator and would not recognize her. Although I wanted to meet with her, she was never interested in having me go into the EEOC office.

13. The primary reason I went to EEOC in the first place was because I was fearful of losing my job. When I first went to the EEOC, I fully disclosed or attempted to fully disclose every fact which supported my fear. After I was forced out of

my job with defendants, I informed EEOC of that fact and on at least two occasions asked to have the EEOC charge amended. Each time I was told that the charge would not be amended since I was adequately protected by the original charge. I don't know what else I could have done to force the EEOC to protect my interests. I relied on EEOC expertise and their statements to me that my interests were fully protected. Until defendants filed their present motion, I was totally unaware that I might not be able to raise a constructive discharge issue because of the claimed factual inadequacy of my EEOC charge.

I swear under penalty of perjury under the laws of the State of Washington that to the best of my knowledge the foregoing is true and correct.

DATED this 1st day of June, 1989.

/s/
Ray F. Albano